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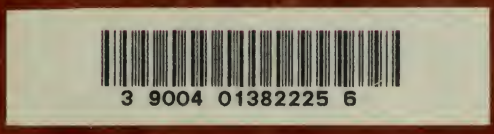

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A NARRATIVE AND EXPOSURE

OF THE

EVIL OF SECRET INDICTMENTS,

BY

GRAND JURIES.

BY

ASHLEY HIBBARD, ESQ., J. P.,

MONTREAL.

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PREFACE.

THE reality of an evil which exists in our Grand Jury system having been brought home to me, very recently, in a fearful manner, has caused me to resolve to do what my humble abilities would permit, to expose, and, if possible, procure its abolishment. Circumstances have delayed, for a few weeks, my commencement of an agitation against that evil, which will be continued whenever an opportunity is presented, and which will terminate only with its abolishment. To this end I have thought it advisable to give a narrative of occurences which are probably only partially known. The names of the persons concerned having been published on a former occasion, there is no valid reason why I should refrain from giving them in full; though in this narrative I would omit the names of the parties, if, by so doing, I was not conscious that I would weaken the force of my statements, which are given as an illustration of the wickedness which the mode of secret indictments for criminal offences, by Grand Juries, favours and aids. But I abstain as far as possible from *ex parte* statements, which cannot be corroborated by others or by public records, and I purposely omit many details which, interesting as they might be to the morbidly curious, would have no bearing on the object I have in view.

In an advertisement, which was inserted some time ago in the daily papers, without my knowledge or consent, reference was made to certain "original documents and letters not produced at the trial," and which were promised in the forthcoming pamphlet. Those letters and documents have nothing whatever to do with the subject now before me; and moreover, for obvious reasons, they will not be made public, at present.

A NARRATIVE AND EXPOSURE

OF THE

EVIL OF SECRET INDICTMENTS.

In the month of June, 1862, I retired from the presidency and management of the business of the British American Manufacturing Company, of which Company I was the largest shareholder and the founder, and the name of which was changed one year later to "The Canadian Rubber Co."

The reasons of my retirement were that my associates, and co-shareholders, the Honorable James Bishop and Christopher Meyer, Esq., had decided to, and did sell out their shares to Messrs. Joseph Barsalou, James Benning, Adolphe Roy, Alfred M. Farley, Peter S. Murphy, and William R. Hibbard. The sale of their shares, by Messrs. Bishop and Meyer, to those parties, left me under the control of persons in whom I had no confidence, with one exception, and which sale was brought about, as I knew quite well, first for the purpose of putting an end to a suit which I had commenced against Messrs. Benning & Barsalou, and which, I will add, was one of no ordinary nature ; and secondly, to cover up and conceal transactions of more than a suspicious character on the part of another of the purchasers, and new directors, who had long been in my employ and confidence, and in regard to which I had began to make investigations, as was known to the person himself. This sale and transfer of shares rendered it necessary for me, either to have a direct collision with my co-shareholders, or to accept an agreement which was tendered to me by the new shareholders, and which reads as follows :

On this day, the thirtieth of June, in the year of our Lord, one thousand eight hundred and sixty two,

Before us, the undersigned Public Notaries, duly admitted and sworn in and for Lower Canada, residing at the City of Montreal, in the District of Montreal, in Lower Canada aforesaid,

Appeared the British American Manufacturing Company, a body politic and corporate, duly incorporated by statute, and hereto present and represented and acting by Joseph Barsalou, of the City of Montreal, Esquire, President of the said Company, of the first part;

Ashley Hibbard, of the said City of Montreal, and District aforesaid, Esquire, of the second part;

And the said Joseph Barsalou, of the said City of Montreal, Esquire, of the third and last part.

Which said parties declared unto us, said Notaries, to have covenanted and agreed to and with each other, as follows to wit:

That whereas, the said Ashley Hibbard has hitherto been the President and General Manager of the said British American Manufacturing Company but has agreed to retire, and *has retired* therefrom; and the said Joseph Barsalou *has been* duly elected President thereof; and the said Ashley Hibbard now stands indebted to the said Company in a considerable sum of money, the balance hereafter to be adjusted between him and the said Company, they being unable at present to state the precise amount.

And the said Ashley Hibbard has further held two hundred and fifty shares (250) of the Capital Stock of the said Company, amounting, at the par value, to the sum of fifty thousand dollars, $50,000; which two hundred and fifty shares of capital stock, together with the further quantity of eighty-two shares of the said capital stock, by him heretofore purchased from John R. Ford, Esquire, of New-Brunswick, New-Jersey, and in part paid for, he has transferred on the books of the said Company to the said Joseph Barsalou in trust; and for the execution of the agreement herein contained, and more particularly the conditions following, viz:

First.—The said eighty-two shares (82) so purchased from the said John R. Ford, shall be disposed of for the benefit of the said Company, in such manner as the Directors of said Company may see fit; the said Ashley Hibbard having abandoned all interest therein, present or contingent, divesting himself thereof absolutely for the benefit of the said Company.

Secondly.—The said two hundred and fifty shares shall be and remain vested absolutely in the said Joseph Barsalou as his property, in trust, as a guarantee for the payment of the indebtedness of the said Ashley Hibbard to the said Company, with seven per cent. per annum, interest on the said indebtedness, and also as a guarantee for the faithful fulfilment by the said Ashley Hibbard of the present agreement, and shall so remain vested in the said Joseph Barsalou for the three years next following the date of these presents, and as long thereafter as the said Company shall continue regularly, and from year to year to pay to the said Ashley Hibbard, in the manner hereinafter mentionned, *ten* per cent. per annum on the amount of the said two hundred and fifty shares of stock reckoned at par, that is to say: the said stock being reckoned at the par value —fifty thousand dollars, $50,000, for the said two hundred and fifty shares of stock.

Thirdly.—The said Ashley Hibbard undertakes not to engage or be in any manner interested, directly or indirectly, in the business or manufacture of any kind of India Rubber Goods, either in Canada or in any of the British North

American Provinces, on pain of forfeiture of his entire interest in the said two hundred and fifty shares of stock.

Fourthly.—In consideration of the premises, the said Company undertakes to allow and pay to the said Ashley Hibbard, for the three years next following the date of these presents, and as long thereafter as the said two hundred and fifty shares of stock shall remain in trust as aforesaid, without being retransferred to the said Ashley Hibbard, at the rate of ten per cent. per annum on the said two hundred and fifty shares, or fifty thousand dollars of stock, payable quarterly, reckoning from the first of May now last past; the first payment to fall due on the first day of August next ensuing, and to be then made subject to the deduction of what the said Ashley Hibbard has drawn since the first of May last past; the said ten per cent. per annum to be afterwards deducted and retained by the said Company out of the regular dividends which may from time to time be declared, and which may become payable in respect of the said two hundred and fifty shares or fifty thousand dollars of stock; and they, the said parties, hereto further agree to place to the credit of the said Ashley Hibbard any surplus of dividends which may from time to time be declared in respect of the said fifty thousand dollars of stock to apply in deduction of his indebtedness to the said Company.

Fifthly.—The said Company assume and undertakes to pay to the said John R. Ford, the balance due to him by the said Ashley Hibbard for the purchase of the said eighty-two shares; said balance, amounting to about eighteen thousand five hundred dollars, which is considered an equivalent for the abandonment to the said Company by the said Ashley Hibbard of the said eighty-two shares of stock.

Sixthly.—It is understood and agreed, and made an express condition of these presents, without which the present agreement would not have been entered into, that should the said Ashley Hibbard at any time hereafter engage in or be in any manner interested, directly or indirectly, in the business or manufacture of any kind of India Rubber Goods, either in Canada or in any of the British North American Provinces, he shall thereby forfeit, for the benefit of the said Company, the whole of the said two hundred and fifty shares, or fifty thousand dollars of stock, in the hands of the said Joseph Barsalou, who shall thereupon have authority without any formality or process of law, and shall be bound on the request of the said Company either to transfer the same or to realise, sell and dispose of said stock for the benefit of said Company, and to pay over the proceeds to them.

Seventhly.—After the expiration of the said three years, the said Joseph Barsalou may, and at the request of the said Company, he shall be bound to retransfer to the said Ashley Hibbard the said two hundred and fifty shares of stock; and from the date of such retransfer, all the obligations of the said Company under the present agreement, shall cease, and such retransfer shall be in the option of the said Company; and should the said Ashley Hibbard then still remain indebted to the said Company, the said Joseph Barsalou shall be entitled, and in the interest of the said Company shall be bound first to sell and realise sufficient of said stock to pay the indebtedness to the said Company, and the transfer of the balance remaining to the said Ashley Hibbard will be

as effectual as if the whole had remained free of charge, and had been transferred to him.

Lastly.—The said Joseph Barsalou, it is understood, assumes no personal responsibility for the payments to be made to or in the interest of the said Ashley Hibbard; but from his interest in the said Company shall have the right to insist on the fulfilment by the said Ashley Hibbard of his engagements under the present agreement, and this shall in no wise prejudice the recourse of the said Company.

Such are the conditions and stipulations of the said parties hereto who have elected their domicil at their respective places of residence above mentioned. Where, &c., promissing, &c.

An act whereof being requested, we, the said Notaries, have granted these presents to serve and avail as occasion shall or may require.

Thus done and passed at the said city of Montreal, in the office of J. H. Jobin, one of us said Notaries, on the day, month and year first above and before written, in the afternoon, under the number nine thousand eight hundred and forty-six of J. H. Jobin's Notarial minutes, and signed by the said appearers with and in the presence of us said Notaries, in testimony of the premises; these presents having been first duly read.

(Signed), BRITISH AMERICAN MANUFACTURING CO.
J. BARSALOU, President.
ASHLEY HIBBARD.
J. BARSALOU.
P. MATHIEU, N.P.
J. H. JOBIN, N.P.

A true copy of the original hereof remaining of record in my office.

J. H. JOBIN, N.P.

I decided to accept the agreement, and I retired under its provisions, believing in the sincerity of Mr. Barsalou, upon whom I looked as the master spirit of the new combination, that "all strife was at an end," and that the Company would "now have all the money it required at Bank rate of interest." But within three months subsequent to signing of the agreement, I discovered that I was looked upon as one who had no interest in the Company; I ascertained that orders had been given to exclude me from the works and the office of the Company, particularly from access to the books. This, with facts and suspicions previously entertained, convinced me of bad faith on the part of the directors: and I saw clearly that my only hope of preventing a complete loss of my property, at the end of the three years, or even before that time, was to secure through the influence and action of my brother, W. R. Hibbard, an honest and economical management of the Company's affairs.

I therefore applied to him, and obtained a promise from him that he would watch carefully over my interests, but I failed to convince him of the reasonableness of my suspicions of some of his co-directors: suspicions which he has since learned, to his bitter regret, were only too well founded.

At this time offers were made to me by parties in England to join them in founding a new India Rubber Company in Manchester, which, after some correspondence, I accepted; and I left for England early in December, 1862, where I remained until August, 1865, or nearly three years.

During the time I was in England I was regularly paid the stipulated quarterly payment of ten per cent. on the amount of my shares in the Company, according to the agreement of June 30, 1862, through my agent, Mr. James Nelson, of this city, until the 1st of May, 1865, at which time payment was refused, and no reasons were given therefor, consequently the following protests were served, under the direction of my solicitors, Messrs. A. & W. Robertson:

On this thirty-first day of the month of May, in the year of Our Lord one thousand eight hundred and sixty-five,

At the request of Ashley Hibbard of the City of Manchester, in England, heretofore of the City of Montreal, Esquire,

We, the undersigned Notaries Public, duly commissioned and sworn in and for that part of the Province of Canada, heretofore constituting the Province of Lower Canada, residing in the City of Montreal, in the said part of the said Province,

Personally went to the office in Montreal of the Canadian Rubber Company, a Body Politic and Corporate, where, being and speaking to Mr. Francis Scholes, the Secretary and Manager of said Company,

We declared unto the said Canadian Rubber Company that:

Whereas, under deed of agrement passed before J. H. Jobin and his Colleague, Notaries, dated the thirtieth day of June, one thousand eight hundred and sixty-two, the said Canadian Rubber Company bound themselves to pay, without any deduction whatever, for and during the space and term of three years, to be accounted from the first day of May, eighteen hundred and sixty-two, and to be payable in and by even and equal consecutive quarterly payments, the sum of five thousand dollars per annum; equal to ten per cent on two hundred and fifty shares, held by the said Ashley Hibbard in the capital Stock of the said Company:

And whereas, at the date of the said agreement it was well understood that three months notice at least would be given previous to the expiration of the said three years by the said Company to the said Ashley Hibbard as to what the

directors of the said Company intended to do in reference to the continuation or non-continuation of the said above mentioned agreement, of date thirtieth day of June, eighteen hundred and sixty-two :

And whereas, the said Canadian Rubber Company refused to pay to the said Ashley Hibbard, or his attorney, Mr. James Nelson, duly constituted under Power, of date twenty-fifth of June, eighteen hundred and sixty-three, the quarterly amount due to the said Ashley Hibbard on the first instant, under terms of the said agreement: and whereas, in statement of account between the said Company and the said Ashley Hibbard rendered by the Manager of the former to the legal representative of the latter, on the fifth instant, the said Company debited the said Ashley Hibbard with the sums paid him from time to time under the terms of the said agreement, contrary to the letter and spirit of the same; and did furthur debit against law and the letter of said agreement the said Ashley Hibbard in the said statement of account with interest on the sums paid him as above:

And whereas, the said Company refused, when solicited by letter, to state in writing what the Directors of the said Campany intended to do in reference to the continuation or non-continuation of the agreement of said thirtieth of June, eighteen hundred and sixty-two, beyond said three years;

Now, therefore, at the request aforesaid, we, the said Notaries, requested the said Canadian Rubber Company immediately to pay to the said Ashley Hibbard, or the said James Nelson, his duly constituted attorney as aforesaid, the full amount due him under said agreement, on the first instant, viz : the sum of twelve hundred and fifty dollars, and also to state in writing at once what the Directors of the said Company intend to do in reference to the continuation or non-continuation of the said agreement of thirtieth of June eighteen hundred and sixty-two.

To all which the said Francis Scholes answered, " I have nothing to say in the matter," which answer not being satisfactory,

We, the said Notaries, at the request aforesaid, have therefore protested, and by these presents do most solemnly protest, against the said Canadian Rubber Company, and all others whom the same doth, shall or may in any way concern, for all costs, losses, damages, detriment, injury and interest already suffered, and which may be hereafter in any other way suffered, and for all and whatsoever else may or ought to be protested for or against, for and in consequence of all and every the causes and reasons above mentioned or incidental thereto.

And we have served a copy hereof upon the said Canadian Rubber Company, speaking as aforesaid.

Thus done and protested at the City of Montreal, at the place and on the day, month and year first above written, these presents bearing the number twenty three thousand nine hundred and eighty-seven of the original deeds of record in the office of T. Doucet, one of the undesigned Notaries, and we have signed in testomony of the premises.

(Signed) E. H. STUART, N.P.
T. DOUCET, N.P.

True copy of original remaining of record in my office.

T. DOUCET, N.P.

On this first day of the month of July, in the year of Our Lord one thousand eight hundred and sixty-five,

At the request of Ashley Hibbard, formerly of the City of Montreal, in the Province of Canada, Esquire, manufacturer, now of Liverpool, in England.

We, the undersigned Notaries Public, duly commissioned and sworn in and for that part of the Province of Canada, heretofore constituting the Province of Lower Canada, residing in the City of Montreal, in the said part of the said Province,

Personally went to the office of the Canadian Rubber Company, a body politic and corporate, where being and speaking to Mr. Francis Scholes, the Secretary of the said Company,

We declared unto the said Company, that :

Whereas, by a certain agreement entered into between the said Ashley Hibbard, and the said Canadian Rubber Company, before J. H. Jobin, and colleague, Notaries, on the thirtieth day of the month of June, one-thousand eight hundred and sixty-two, the said Ashley Hibbard is declared to be a stockholder in the said Canadian Rubber Company, for an amount of shares equal to fifty thousand dollars ;

And whereas, from the date of the said agreement to the present time the said Ashley Hibbard has remained and is still possessed of the said shares to the amonnt of fifty thousand dollars in the stock of the said Company ;

And whereas, the said shares are by the terms of the above mentioned agreement held in trust by Joseph Barsalou, Esquire, the President of the said Company, as security for the payment of an amount in which the said Ashley Hibbard stands indebted to the said Company ;

And whereas the said Joseph Barsalou in his capacity of such trustee, is and will be held responsible for the manner in which he has discharged the duties of his trust ;

And whereas, shortly after the passing of the said agreement, the President and Directors of the said Canadian Rubber Company passed a resolution and issued instructions to their *employés* to prohibit the said Ashley Hibbard from entering the works ;

And whereas the said Ashley Hibbard, as a very large stockholder in the capital stock of the Company, and as deeply interested in its management, has from time to time, since the passing of the said agreement, tendered to the Directors and Managers of the said Company such counsel and advice for the benefit of the Company, as his matured judgment and lengthened experience in Rubber Manufacture have fully entitled him to offer ;

And whereas, such counsel and advice have been uniformly rejected and set aside, and in consequence of such rejection, the said Ashley Hibbard believes his interests and the interests of the other stockholders have greatly suffered ;

And whereas, for the space of three years, the President and Directors of the said Canadian Rubber Company have studiously withheld from the said Ashley Hibbard all knowledge of their proceedings ;

And whereas, desiring for important purposes, to acquaint himself with the extent and nature of the transactions between the said Canadian Rubber Company and Messrs. Benning and Barsalou, he the said Ashley Hibbard applied on the nineteenth day of June last, through his duly authorized attorney,

James Nelson, of the City of Montreal, Esquire, architect, duly constituted under Power of Attorney, and which Power of Attorney was forwarded to the Secretary of said Company on the twenty-sixth day of June last, to make certain extracts from the Books of Account of the Canadian Rubber Company: the British American Manufacturing Company, Hibbard and Company and Brown, Hibbard, Bourne and Company, which permission to take such extracts the President of the said Company, by letters of date twenty-first day of June last past informed the said James Nelson, as such attorney, would probably be granted;

And whereas, the Secretary of the said Company, by letter of the twenty-sixth of June last, requested the said James Nelson to state what were the extracts required, and the said James Nelson, by letters of the twenty-eighth of same month answered that the extracts which were required from the said Company's books were copies of all accounts, statements or memoranda relating to business transactions between the Company as at present organized: The British American Manufacturing Company; Hibbard and Company, and Brown, Hibbard, Bourne and Company, on the one hand, and Messrs. Benning and Barsalou on the other hand;

And whereas, as by letters dated the twentieth-eighth of said month of June last signed by their Secretary, the said Canadian Rubber Company refused to allow such extracts to be taken;

And whereas, the said Ashley Hibbard doth in consequence suffer considerable pecuniary loss and injury;

Wherefore, at the request aforesaid, we the said Notaries have *de novo* requested the said Canadian Rubber Company to furnish the said Ashley Hibbard with true copies, compared by the said James Nelson, as such attorney as aforesaid with the original thereof, of the different accounts above mentioned, or allow the said James Nelson, as such attorney, to take such copies himself.

To which request and demand the said Francis Scholes answered: The answer written on the twenty-eight ultimo to Mr. Nelson, as Mr. Hibbard's attorney, is an answer to the present request.

We, the said Notaries, at the request aforesaid, have therefore protested and by these presents do most solemnly protest against the said Canadian Rubber Company, and all others whom the same doth, shall or may in any way concern for all costs, losses, damages, detriment, injury and interest already suffered and which may be hereafter in any way suffered, and for all and whatsoever else may or ought to be protested for or against, for and in consequence of all and every the causes and reasons above mentioned or incidental thereto.

And we have served a copy hereof upon the said Canadian Rubber Company, speaking as aforesaid.

Thus done and protested at the City of Montreal, at the place and on the day, month and year first above written, these presents bearing the number twenty-four thousand two hundred and fourteen of the original deeds of record in the Office of T. Doucet, one of the undersigned Notaries, and we have signed in testimony of the premises.

(Signed) E. H. STUART, N.P.
T. T. DOUCET, N.P.

True copy of the original remaining of record in my office.

T. DOUCET, N.P.

When advised of this by Mr. Nelson, I began making preparations to leave England and return to Canada, and I arrived here on the 29th of August, 1865. The day following, I called upon Mr. Barsalou, and endeavored to discuss my relations to the Company with him, but I was coldly received, and curtly answered. He informed me that the Company was ruined past all hope of resuscitation, but refused to allow me to see the books. He assumed the Grand Seigneur style, and acted and spoke as if it were an impertinence on my part to presume to make any enquiries as to the causes which had led to a total loss of my property.

I called upon Mr. Learmont, who, with Messrs. Wm. Moodie, John Pratt, and Amable Prevost, had joined the Company, and become a director, during my absence, and endeavored to get some information from him. He received me much more politely than Mr. Barsalou did, but not one word, good or bad, could I get from him in regard to the Company's affairs, except a good deal of abuse of my brother for inducing him to become a shareholder and director, of which I knew nothing. I then requested a friend to say to Mr. Moodie that I would be glad if he would give me an opportunity of speaking to him on the subject. My friend did so, and informed me that Mr. Moodie did not condescend to say a word in reply. I called on Mr. Pratt, and endeavored to talk with him on the subject, but all to no purpose. It then was quite evident, that it was useless for me to make any more efforts in a friendly way, and I had recourse to my lawyers. A suit was instituted about the middle of September, for past due quarterly payments, under the agreement, amounting to $2500. Another suit was instituted to rescind the agreement of June 30th, 1862, and also a writ of "mandamus" was applied for, to give me access to the books of the Company.

Shortly after these two first named suits were commenced, I was approached by Mr. Murphy, who first called on Joseph Duhamel, Esq., with whom I was staying, and informed him, that he, Mr. Murphy, was very anxious to have a reconciliation, and "entendement" with me; that if I chose to unite with Mr. Farley and himself to "smash the Company and acquire possession," we could succeed. Mr. Duhamel repeated this conversation to me and shortly afterwards I had an interview with Mr. Murphy who urged

a vigorous prosecution of my suits, as one of the means of success. He also informed me that the directors, (he being one, would continue to be one, solely to let me know what transpired at their meetings), had decided to cut the ground from under me, by transferring certain notes of the Company, of a large aggregate amount, to James Benning, who was not a director, for the purpose of sueing the Company in his name, as a "*pret nom*," obtain judgment by default, and by that means acquire a first claim on the real estate of the Company. This information was given to me by Mr. Murphy in strict confidence, and would not now be divulged but for the fact that I know that the attempt made to indict me for perjury, in consequence of the affidavit which I made, based upon this information from him, and also all the other proceedings and indictments, was through his instigation. The allegations contained in that affidavit I fully believed at the time, and I still believe were and are strictly true in every particular.

In consequence of this information, I instructed my solicitors, Messrs. Robertson, to intervene. I told them of what I had been informed, and the name of my informant, before the suit was entered in the books of the Court. The suit, "Benning vs. The Canadian Rubber Company," was very soon after instituted by the lawyer who was acting for the Company against me—Mr. Girouard —and the following affidavit and petition were fyled by Messrs. Robertson in my behalf:

PETITION.

"That the Petitioner is a creditor of the Company, and is interested in two hundred and fifty shares of the said stock as the owner thereof, and is entitled to watch over his interests and those of the Company.

"That the several parties in whose favour the six promissory notes in the Plaintiff's declaration mentioned were made, to wit: the said William Moodie, John Pratt, William Learmont, Adolphe Roy and Amable Prévost, were at the dates of the said promissory notes, and still are, directors, and Joseph Barsalou, president of the said Canadian Rubber Company, the Defendants.

"That the Petitioner, by himself and his agents, hath frequently demanded and asked of the said directors access to the books of the said Company, which the said directors have illegally refused.

"That divers large sums of money have been, by the said directors, paid to the said James Benning and the said Joseph Barsalou, co-partners, doing business at Montreal under the name of Benning & Barsalou, for pretended commissions

which are illegal, of which the Petitioner hath complained by proceedings pending in this Honorable Court, previous to the institution of the present action.

" That the said directors have, for upwards of eighteen months, illegally and corruptly discounted notes of the said Company to a large extent, being themselves directors, and keeping the discounts and bonuses on said paper, and got and obtained thereby very large sums of money from the funds of the Company, for such pretended discounts and for their services as directors of the Company, without the vote of the shareholders, and contrary to law, to wit: to the extent of twenty thousand dollars in all.

" That the said several promissory notes in the declaration of the Plaintiff in this cause made, were notes connected with the said discounts, and pretended advances by the said directors, and are not held *bonâ-fide* by the said Plaintiff, who is merely a *prête-nom* and acting for and on behalf of the said directors, and to enable them to recover judgment against the Company by default, and obtain a mortgage and preference on the Company's real estate, previous to the Petitioner, and other just and lawful creditors of the Company; that the said directors are the true holders of all the said notes which were in fact made to cover up said transactions of the directors connected with their said discounts and service, and were made for no real legal value or consideration. And that the said Plaintiff fraudulently contrived with the said Joseph Barsalou, president of the Company, and partner of the said Plaintiff, and with the said directors of the said Company, to obtain possession of the said notes with a view to get judgment in favor of the nominal Plaintiff in the interest of the said directors, and with a view to obtain an illegal and unjust preference over the creditors of the said Company, and in fraud of their rights and the rights and interest of the Petitioner, and by concert with the said directors arranged that he, the Plaintiff, should sue on said notes, the said notes obtained without any *bonâ-fide* value or consideration given therefor, but for the purpose aforesaid, and with a view that the case should go by default; the action having been so brought by the Attorney and Counsel of the said Company, but against the interests of the Company, and well knowing that the said notes were illegally and fraudulently made, and without any consideration in law having been given therefor, either to the Company or the said alleged endorsers of said notes.

" That the creditors of the Company generally, and the Petitioner in particular, will be greatly prejudiced by the said Plaintiff obtaining a judgment on the said notes, or upon any of them, and hath an interest to intervene in the cause, to allege and prove the said facts and to watch over his interest."

AFFIDAVIT.

That deponent has reason to believe, and doth verily, and in his conscience believe that the said William Moodie, Adolphe Roy, William Learmont, John Pratt, and Amable Prévost, in the Plaintiff's declaration mentioned, and in whose favour the promissory notes, in the Plaintiff's declaration mentioned, were severally made, have obtained very large sums of money out of the Company's funds illegally, and without any just cause, for alleged discounts and security given by the Directors for the Company, and for the services of the Directors rendered to the said Company, without the vote or sanction of the Shareholders,

and have applied said funds to their profit, and that the Directors had mismanaged the works of the Company. That the notes sued upon by the said James Benning are not, as deponent believes, the property of the said Plaintiff, but are sued in his name in concert and collusion with the said Directors or some of them, with a view that default should be entered against the Company, and a judgment obtained by default, in order to secure, if possible, a preference or mortgage to the said Directors on the real estate of the said Company, in fraud of the creditors of the Company and against their interest, and those of the said deponent, without *bonâ fide* valuable consideration given for said notes to the said Company, and that the Plaintiff is a *prête-nom* for the Directors, and acting in their interest, and not in his own sole interest:

The Company did not appear, except by Mr. Girouard and Mr. Cross, in this suit, and then solely to contest my petition. Judge Monk rendered judgment as follows in this suit:

LAW INTELLIGENCE.

SUPERIOR COURT.

BEFORE MR. JUSTICE MONK.

OCTOBER 27th, 1865.

BENNING *v.* CANADIAN RUBBER CO.; and HIBBARD, intervening.—His Honor said, application for the allowance of the intervention, fyled in this case by Mr Hibbard, would be granted on the following grounds:—

1st. The clear and precise allegations contained in the intervention, and in the affidavit in support thereof sworn to by Mr. Hibbard, made out a *prima facie* case, shewing that Mr. Hibbard was interested in preventing the plaintiff from obtaining judgment, and that his Mr. Hibbard's interests might be seriously jeopardized if the plaintiff obtained such judgment.

2nd. That Mr. Hibbard, as a creditor, had a legal right to intervene and prevent the Court from unconsciously doing a great injustice by pronouncing a judgment which might be very detrimental to his interests.

3rd. Mr. Hibbard had a still stronger claim to be allowed to intervene, as the owner of 250 shares of the capital stock. This commercial Company, if not insolvent, would seem, from the allegations of Mr. Hibbard, to be on the verge of insolvency. Under all these circumstances, the Court had no hesitation in saying that Mr. Hibbard must be allowed to come before the Court and make proof of his allegations. Intervention allowed.

The Company appealed this judgment, and the matter was consequently "shelved." Soon after this judgment was rendered, my last interview with Mr. Murphy took place. My object in consenting to listen to his plans was to get information from him, and through him take advantage of any favorable opportunity which

might be presented, to effect a settlement with the Company. I, however, soon perceived that my object was in direct opposition to the one he had in view, and which appeared to me to be so much like a scheme of robbery of his co-directors and shareholders, that I abandoned all communication with him.

At this time also an offer was made to me by Mr. Barsalou, through my friend, Mr. Duhamel, to assume the debts of the Company, and take a transfer of all the shares; in short, an offer which consisted in transferring to me all the property and assets of the Company, in consideration of my assumption of its debts, all of which, $140,000, or thereabouts, was due to the directors of the Company as endorsers of its paper. This offer I accepted, but after accepting it Mr. Barsalou informed me it was withdrawn. The offer was renewed voluntarily, to my surprise, by Mr. Barsalou, in a week or ten days afterwards, through Albert Furnis, Esq., and again it was accepted and withdrawn. This was so extraordinary a proceeding, and so unlike what I would have expected from any person of common sense, that I had to seek for the cause in the supposition, which I know now to be correct, viz., that Messrs. Murphy and Benning & Barsalou (particularly the first named person,) *dare not*, ever allow me to get access to the books of the Company, and hence nothing short of a complete "smash up" of the Company, and annihilation of all its books and records would suit their purposes. Seeing plainly that it was useless to have further communication with any of the directors, with the view to an amicable settlement, from that time I ceased to have any, directly or indirectly, with them. I have subsequently learned that soon afterwards the directors held a meeting at which they discussed the question, whether they should settle with me by paying me a certain sum of money, or each subscribe three thousand dollars to crush me, and they deliberately decided upon the latter course, because "they did not feel themselves safe so long as I was in the country." I have also learned that their expenditures thus far in the effort to accomplish their object exceeds $12,000, and how far such a sum can be legitimately spent, every one can decide for himself. Soon after this, viz., on the 30th of November, Judge Badgley rendered judgment in my favour on the mandamus case as follows:

HIBBARD *vs.* BARSALOU

In this case an application had been made for a writ of *mandamus*, for the purpose of compelling the directors of the Canadian Rubber Company to allow plaintiff communication of the books of the Company. The application was made to Mr. Justice Berthelot, and he ordered the writ to issue, returnable on the 19th of the following month.

He (Mr. Justice Badgley) saw nothing to prevent a judge from ordering a writ to be returned in term, or from ordering a writ to be proceeded with in vacation. The statute said application might be made to the Superior Court, or to a Judge of the Court in vacation. The case went on, and was met by a motion to quash, by a declinatory exception, and by an exception *à la forme*. Our statute laid down a particular form of proceeding for *mandamus*. In England a very circuitous procedure was followed; but our statute has set aside all that.

It was declared that when the writ issued it should not be quashed otherwise than by pleading. The motion to quash must, therefore, be discharged. With respect to the declinatory exception, there was nothing to decline, and this exception must, therefore, be rejected. There remained the exception *à la forme*, which embraced all that was urged under the other heads, with reference to the right to issue the writ itself. It was true that in England the courts had avoided issuing writs of *mandamus* where public interests were not involved; but our statute had made the *mandamus* a part of our law. It was not, as in England, a thing governed by the common law only. The statute pointed out a particular mode of proceeding. The writ was issued by the judge on petition, or *requête libellée* supported by affidavit. The writ was like an ordinary writ of summons, calling upon the party to come in and answer it. The party on whom it was served could only answer it by pleading. In this case, then, the first point was, whether the plaintiff had such an interest as to justify him in having access to the books of the Company, as he asks in his petition? His Honor thought he had. His right in the Company had been bought out for $50,000. He was no longer to be President, and he was not to be permitted to establish a rival institution in the colony within three years. During that time he was to receive 10 per cent., or $5000 per annum on his capital, and then further arrangements were to be made. For carrying out these arrangements the plaintiff placed his shares in the hands of Mr. Barsalou, individually, as a security for the contract that was entered into. But he did not divest himself of the stock in the institution. Had the plaintiff not an interest in this institution if he remained in the same position now as then? His interests could not be denied. He had set up specific grounds for desiring not to look into all the transactions of the Company, but into the transactions between Messrs. Benning and Barsalou. At first he had been promised permission, and then he had been refused. This looked as though there were something suspicious to be covered up. The plaintiff, having reasonable grounds of complaint, was entitled to his *mandamus*. Proof had been made on the exception, which was sufficient, and it would be dismissed.

The Company immediately appealed from his decision. In the meantime my suits for past due dividends and rescinding of the

agreement were contested by the Company, in every possible way, for the purpose of causing delay. An exception was taken to my actions on the ground of my being a non-resident, but it was dismissed; and, after various other and vexatious little obstacles, were overcome by my lawyers, the suits got to "*Enquête*" in December term. As my suits were brought on a notarial agreement, I had no witnesses to examine, consequently the Company at once began the examination of their witnesses in defence. They first examined me, which took up all December term, after which, in January-February term, they commenced examining Joseph A. Rogers. During their examination of Rogers, an argument was had before Judge Monk, which drew from the Judge an intimation that he would issue an order for the books of the Company to be brought into Court, on my application, so soon as we commenced our cross-examination of Rogers. This was evidently an unexpected blow to the opposite parties, and the most energetic resistance was made to our arguments in favour of such a course, but to no purpose, as the Judge was evidently quite decided in our favour and right to have access to the books. During my examination, questions were asked me constantly which could not be answered without reference to the books, and every advantage was taken to entrap me in reference to accounts and transactions of four and five years previously, to which I replied, "I cannot answer without seeing the books," and it was our great object to get at the Company's books at the first chance we could get. The judgment on the mandamus case had been appealed, and it appeared to be more than probable that a decision in appeal on that case would not have been had until June. Both parties, and their lawyers, knew quite well that the suit for past due payments, under the agreement, was of comparatively little importance to the mandamus case, which last named case was instituted solely for the purpose of enabling me to get access to the books of the Company, and our opponents had safely, as they thought, secured a delay of six months on that point, and now to have our object gained by a side wind was too much for them to bear with equanimity. But how to avoid producing the books, they were at a loss to tell, until they hit upon the following expedients. First, they continued the examination-in-chief of

Rogers through the whole of that *Enquête* term, taking about *fifteen days to examine that one witness*. Secondly, when March *Enquête* term came round, Rogers fell ill, though his illness was of so extraordinary a character as to permit him to go anywhere he pleased, except to the Court house. He was seen in the streets during the day, and frequenting drinking saloons at night. We fyled an affidavit to that effect, but the opposite parties produced a certificate from a medical man, certifying that he was too ill to leave his house. Consequently, as by this time several of the eight days of the term had gone by, we had no alternative but to wait patiently for April term, and now I commence the narrative of which the foregoing is but the necessary preliminary explanation :

On the 26th of March, indictments were secretly presented to the Grand Jury, Court of Queen's Bench, charging me with larceny, embezzlement and perjury, and ten true bills were found. These offences charged against me in this way behind my back, and without my knowledge, were alleged (with the exception of one for perjury), to have been committed four years previously, prior to my retiring from the presidency and management of the Company's affairs, and of course prior to the agreement of June 30th, 1862, and were all for sums of money which the Company had claimed in the incidental demand which they had fyled in the civil suit, as offsets to my claims against them, the correctness of which I was contesting.

I knew nothing of those indictments until a few hours before the Grand Jury made their returns into Court, and I probably would have known nothing of them until informed that the bills had been found against me, but that my friend, Mr. Duhamel, (who was at all times most indefatigable in his efforts to serve me), learned accidentally during the day, that indictments were being presented to the Grand Jury against me. On being informed by Mr. Duhamel that such indictments were being presented, I waited in his office to learn the result. The Grand Jury returned late into Court that day, and immediately afterwards the Court adjourned. Mr. Duhamel, myself, and Mr. James Nelson (who was also waiting with me to learn the result) were completely paralysed. What was done and said during the next few hours is confused

in my memory. I know that I suffered the most intense agony, and I submitted quietly to the guidance of my friends, Messrs. Nelson and Duhamel. I remember going to Mr. Cassidy's office, at their suggestion, to secure his services for my defence, and there being informed by Mr. Cassidy that he was feed by the opposite parties, but as an old schoolmate and friend, he said, he was willing to assist me as far he could consistently with his position. He also said that he would or had sent for Mr. Murphy, and he hoped a settlement might be effected. I remember Mr. Murphy arrived in a very short time, and a proposition was made by him that I should pass the night at his house, to which Mr. Nelson and Mr. Duhamel acceded, and I accompanied Mr. Murphy to his house, though why I did so, I do not recollect, but think something was said about avoiding the pain and alarm to my family which would be caused by an arrest at my house. I however remember having presence of mind enough to request Mr. Duhamel to bring Mrs. Hibbard to join me there, in order that she might hear every thing first from me, and she arrived at Mr. Murphy's house a few minutes after I did. By this time I was somewhat recovered from the shock, and was able to listen to a conversation which took place between Mr. Farley, Mr. Murphy, and Mr. Duhamel, as to what was to be done. At last a suggestion was made (I think by Mr. Farley) that I should leave the country by the 10 p.m. train that night. The moment that suggestion was made I became more cool, and I asked Mr. Farley if that was his advice to me in regard to it. He refused to give me any advice. I then turned to Mr. Murphy and asked him what he would advise. He replied, "I think if you kept out of the way for a few days a "more favourable settlement may be effected with the prosecu- "tors." This reply completed my cure ; I saw through the plot, and replied, "I certainly shall not go ; it would be tantamount to "a confession of guilt or cowardice, and I am neither guilty nor a "coward." I soon after left Mr. Murphy's house and went home, after first driving to the houses of one or two of my friends, in order to secure bail for the following day. I was urged to stay all night, but I refused. During the night I became clear, and saw through the matter fully.

My position was one of no ordinary kind or anxiety. My ene-

mies were numerous, unscrupulous, cunning, wealthy, and powerful, compared with whom I was a mere pigmy in the essentials requisite for such a *deadly* contest, and against whom I was obliged to contend singly. They were also in possession of all the records, for ten years, of my business transactions. One of them had been my most confidential assistant and manager during all that time, so much in my confidence as to render him practically almost irresponsible to me for his acts. Hundreds of blank notes and cheques, signed by me, were given to him during that time, to be used in my temporary absence from time to time, and what use he had made of them it was impossible for me to say. He had also held a power of attorney, and had transacted the whole of the Company's financial business. Hundreds of his transactions, I was persuaded, I never knew anything about. All the records of my private and domestic business were also contained in the books of the Company. Large sums of money had been placed to my private credit—at one time as much as $12,000 was so paid, and all my private accounts were paid to my debit by the cashier of the Company. Under these circumstances, and having been arbitrarily deprived of access to those books for four years, with a certainty that all that human ingenuity could devise, to torture and twist everything that could be possibly tortured and twisted, to my injury, would be done ; betrayed by my most intimate and confidential clerk and financier, who, of all the others, was the most interested and determined to destroy me, who, to my knowledge, had for years been bent upon my destruction solely to save himself, and whose powers for intrigue and deception were not only unsurpassed, but hardly equalled by any man living, being almost satanical in extent and power. What unexpected mine might be sprung upon me from those voluminous records of large, and, at times, complicated transactions, which, from memory, it would be utterly impossible for me to understand or explain. All this rendered my position an anxious one. Still I had only one course to take. Charges had been made against me behind my back, which I knew were trumped-up for the purpose of crushing me, of which I was innocent, and which had been published to the world, which I could honorably meet only by demanding a trial, although by doing so I knew that I increased the perilous nature of my situation, by forcing my enemies to strain every nerve

and to make use of all the means which bribery and corruption could place at their command, to convict me, in order to save themselves. It will readily be seen that it required all the nerve which I possessed to enable me to go through such an ordeal; but it appears to me that it was to be my fate to be the instrument of showing up and exposing to the execration of my fellow-men the system of which I have been one of the victims.

The next day I attended at Court as soon as it opened, gave bail, and fixed the trial "in a week from that day, or any day the Court would name." Mr. Andrew Robertson appeared for me, as I had not had the necessary time to secure the services of a lawyer who followed the Criminal Court; and, on subsequently seeking for one, we found that every lawyer, without exception, who followed that Court had been feed some time before by the other side. At last we secured the services of Robert Mackay, Esq., who had a good deal of experience as a criminal lawyer, while acting as Crown Prosecutor several years ago, and the result has shown that a better selection could not have been made. We subsequently secured the valuable services of B. Devlin, Esq., who, we were informed, had been communicated with by the prosecutors, but it turned out that it had been only by an attempt to secure him through misrepresentations, in order to keep him from serving me.

On the morning of the day following the indictments the prosecutors saw that I was preparing to fight, and that I certainly showed no inclination to run away. Consequently, they apparently decided to lose no time in making an effort to effect a settlement with me; for, on my return home from the Court-house, after giving bail, at about noon of the 27th of March, I found that Mr. Murphy had been for an hour or more at my house —where he had not been before since my arrival from England —in conversation with Mrs. Hibbard, endeavouring to influence her in favour of effecting a settlement, and thus to avoid, as he said, the disgrace attending a trial, but without success. That day Mr. Murphy called three times, and Mr. Farley twice, with that end in view, and I was besieged at home and at my lawyer's office by Mr. Murphy, during the days and nights of the 27th and 28th of March, who endeavoured to effect a settlement, which I steadily

refused, until the evening of the day last mentioned, when he called at my house and urged me to go with him to see Mr. Girouard, the lawyer who had acted for the Company and prosecutors throughout the civil and criminal proceedings, stating that from the first moment the directors decided to indict me, he (Murphy) had opposed such a course : and now that he was doing all that man could possibly do to serve me by endeavouring to effect a settlement, " a fatality seemed to intervene and render his good offices of no avail." I at last consented to go with him and with Mr. Duhamel, who was present, and heard all that passed, to Mr. William Robertson's house, and to be guided by his (Mr. Robertson's) advice. Mr. Robertson quite agreed with me in refusing to entertain, for a moment, *any proposition whatever* in reference to the criminal proceedings ; but he was inclined to accept an offer, which Mr. Murphy made, of a certain sum of money to settle the civil suits. Whether Mr. Robertson named the sum which we would accept, or that the specific sum was named by Mr. Murphy or by Mr. Girouard, I do not recollect ; but the proposition to settle, and a sum of money to be paid to me by the Company, was distinctly Mr. Murphy's proposition, and was made to me many times, and as often refused, until it reached the larger sum, which Mr. Robertson advised me to accept, which I did, though very reluctantly, fearing it might compromise me in the outrageous criminal proceedings which they had taken against me, and which I had determined to " put through to the bitter end." Mr. Robertson, however, said over and over again to Mr. Girouard, " that he would have " nothing whatever to say about the criminal proceedings ; that his " (Mr. Girouard's) clients had chosen to take such proceedings, and " they must abide the consequences ; that if he (Mr. Girouard) " chose or wanted to settle the civil suits apart from and without " mentioning the criminal proceedings, he (Mr. Robertson) was wil- " ling to do so, but that he (Mr. Robertson) would not hear one " word about the indictments, or anything relating to them ; that " as far as they—the indictments—were concerned, Mr. Hib- " bard was in the hands of Mr. Mackay." The result of the interview was an agreement to settle the civil suits, in consideration of a certain sum of money to be paid to me by the Company, under mutual discharge, to be executed between myself and the Company.

This was during the night of March 28th, 29th, and on the 31st the discharge was signed, and the cheque for the money was handed to Mr. Robertson, who gave it to me. Thus the civil suits were terminated.

On the 5th day of April, Mr. Mackay applied in the Court of Queen's Bench, for a day to be fixed for the trial of the indictments against me, as the day originally named—the 2nd of April—had passed. The Crown Prosecutor said the calendar was so large that he could not possibly name a day for the trials; but on Mr. Mackay expressing, on the part of his client, anxiety that a trial should be had during the term, and that they should not be put off to September term, the Judge (Mondelet) said that the trials should "take place this term, even if he had to sit until the 1st of June."

On the 12th of April, Mr. Mackay moved for a subpœna "Duces Tecum" for the production of the books of the Company in order to enable me to prepare for the trials. This was resisted by Mr. Carter, the advocate for the private prosecutors, and was refused by the Judge as irregular; he however stating that he would order the issue of the subpœna for producing the books at the trial, and we should have ample opportunity to inspect them.

On the 17th of April, Mr. Mackay gave notice to the Crown prosecutor that he would move for information as to which of the indictments the prosecutors would proceed upon first. The Crown prosecutor, Mr. Ramsay, requested Mr. Mackay in open Court to defer his motion for one day, giving as a reason that he wanted to see the lawyer for the private prosecutors before deciding which of the indictments he would try first, which request was of course granted, and on the 19th of April, Mr. Ramsay, having consulted with the private prosecutors, or with their lawyers, named the indictment in accordance with the requirements of Mr. Mackay's motion. The reader is requested to pay particular attention to all these dates and to what follows.

On the 24th of April, Mr. Mackay made another application, in open court, for a day to be named for the trial, but still Mr. Ramsay could not comply, for the same reasons as those given at first, and got out of patience, saying he "was sick of these frequent applications," and that a trial would be had as soon as possible.

Our reasons for those frequent applications were that we knew that the private prosecutors fully expected to be able to get the trials postponed to September term, owing to the large calendar, and we were very anxious to defeat their object, and, if possible prevent the injury which would accrue to my business and character by having such fearful charges hanging over me for that length of time. The firmness, and indefatigable zeal, of the Judge, in the discharge of the duties of his high office, alone prevented such a result.

At last a day was fixed for the trials, viz: the 2nd of May, and my mind was greatly relieved; but on the morning of the day named, the lawyer for the private prosecutors coolly rose and requested the Court to postpone the trials to September term, and supported his application by the following extraordinary affidavits, sworn to by Mr. Girouard, and by Mr. Murphy :

Peter S. Murphy, of the city of Montreal, being duly sworn, deposeth and saith:

That he is a director of the Canadian Rubber Company, heretofore the British American Manufacturing Company.

That on the 31st March last, it was understood and agreed, in the presence of deponent, between Defendant, Ashley Hibbard and the Attorney of the said Canadian Rubber Company, that the trials of the said Ashley Hibbard upon the several indictments found against him during present term of this Court, would not take place during the present term.

That in consequence of the said understanding, Alfred M. Farley, of the city of Montreal, manufacturer, heretofore in the employ of the British American Manufacturing Company, at the several dates mentioned in said indictments, who was present in this city for the purpose of giving evidence as a Crown witness, left this city two or three days after for the United States of America, where the said Alfred M. Farley still is.

That the said Alfred M. Farley is a material witness for the Crown upon the said indictments, and that in his absence the said trials of the said Ashley Hibbard cannot safely be proceeded with. That the said Alfred M. Farley, as deponent is informed and believes, can prove the same facts set forth and contained in the deposition of Joseph A. Rogers, now in the possession of the Crown officer, and that his attendance cannot be procured during the present term; but deponent verily believes that his attendance before this Court can be procured for the ensuing term of this Court.

That it was not until after the said Alfred M. Farley had left for the United States that the said Ashley Hibbard, contrary to the understanding so arrived at, made application to this Honorable Court, through one of his counsel, that the trial of said Ashley Hibbard should be proceeded with during the present term; deponent believing that said Ashley Hibbard intended thereby to force on a trial in the absence of the said Alfred M. Farley, and other material witnesses.

(Signed,) PETER S. MURPHY.

Sworn in open Court, this 2nd day of May, 1866.

Désiré Girouard, of the city of Montreal, advocate, being duly sworn, deposeth and saith :

That on the 31st March last, it was agreed and understood between the Defendant, Ashley Hibbard, and deponent, attorney of the Canadian Rubber Company, that the trials of the said Ashley Hibbard upon the several indictments against him, would not take place during the present term.

(Signed,) DÉSIRÉ GIROUARD.

Sworn in open Court, this 2nd day of May, 1866.

The coolness of this proceeding, and the manner in which these affidavits were made was so barefaced as almost to deprive me of breath. There was not one word of truth in the declaration that an agreement had been made with me to postpone the trials ; not the slightest shadow of a foundation for such a statement, and the attempt to throw upon me the odium of endeavouring to force on the trials after getting rid, by the alleged agreement, of certain witnesses, who in consequence of said pretended agreement, it was stated, had gone away, was so absurd and childish as to cause contempt and merriment rather than anger. We had been so frequently before the Court, as above mentioned, that no one was deceived for a moment. The absurdity involved in such an agreement, if made, would perhaps not have been surprising in Mr. Girouard, but certainly no other lawyer at the Montreal bar would have ventured upon the commission of such folly. A mere boy should know that the day of trial for criminal offences, when once fixed by the Court and the Crown prosecutor, is a finality unless the same authority chooses, for sound reasons, to make a change. It was a last foolish bungling attempt to get the trials postponed, and it was treated with as much contempt as the place would permit of. The Judge ordered the affidavits to be "recorded," in a most significant way, and ordered the trial to proceed. But another affidavit was fyled, sworn to by Mr. Barsalou, stating that material witnesses were absent, and the private prosecutors made such efforts that the Judge at last consented to postpone the trial for four days, not including Sunday. At the expiration of the four days, viz., on the 7th of May, the indictment, which the prosecutors had elected to try first, again came before the Court, when another effort was made by the prosecutors to postpone the trial on the ground of the absence of a material

witness, but a further postponement was refused by the Judge. A *nolle prosequi* was then offered by Mr. Ramsay, which the Court refused to receive, and ordered the Jury to be called, upon which the Crown prosecutor, and the private prosecutors rose and left the Court, leaving no one but the Clerk to conduct the prosecution. The Judge ordered the Clerk of the Crown to prosecute, and the result was, "no evidence being adduced for the prosecution the Jury were ordered to acquit."

My advocates then made application for a trial on another of the indictments, and while they were addressing the Court, the Crown and private prosecutors returned into Court, and another trial was proceeded with, the one for perjury, but it was stopped by the Court, while examining the first witness, and before the merits were entered upon, on a technical, or legal point, and the Jury were ordered to acquit.

On the following day another indictment was proceeded with, one for larceny, which broke down on the merits while the second witness for the prosecution was being examined, and it was also stopped by the Court, and the Jury were ordered to acquit.

The next day the Crown prosecutor rose and stated that it was his intention to enter a "*nolle prosequi*" on all the remaining indictments, and a lengthened and interesting argument took place; the Crown prosecutor contending that he had a right to enter a *nolle prosequi* without reference to the Court, and he stated plainly and distinctly, over and over again, that the Court had no power to refuse its consent. This pretension was resisted and combated by Mr Devlin, in a most able manner, on legal, but principally on high constitutional grounds, but it was finally decided by the Court that, practically, the right to enter a *nolle prosequi* was vested in the Attorney General, and consequently also in his representative, by long continued usage, in English Criminal Courts.

It is my wish not to allow myself to be turned aside from the object I have in view in penning this narrative, or I would enlarge as far as my humble abilities would permit on this most important question. Here is a pretension of a right, or power, being vested in the Attorney General, and in his numerous representatives arising solely from practice, or usage, which in this instance was in direct opposition to, and in conflict with, the fundamental principles of our consti-

tution and criminal law, and yet it is admitted by this decision that practice or usage must prevail; equity and common sense are set aside, Magna Charta practically violated, in order to uphold a usage which has originated no one knows when or how. It is probable that a similar case never yet arose in a Court of Justice. Certainly amongst the numerous precedents cited, not one was produced showing that a *nolle prosequi* was entered in defiance of the assertion of the right of the accused to demand his trial, and I can learn of no such case having occurred in England or America, where the English Criminal laws and usages prevail.

But to return to the object before me, viz., exposing the evil of the practice of secret indictments by Grand Juries. I refrain from going into a long detail on the merits of the charges upon which the indictments were made, first, because this is not the time nor place for such details, and they would involve the necessity of *exparte* statements, which I wish to avoid as far as possible. Secondly, because the guilt or innocence of an individual is of far minor importance, and should not be weighed for a moment in the balance with the subject, which affects the very foundations of society; and thirdly, because it would be unwise to anticipate revelations which will very shortly be made in the proper place, at the proper time, and which involve the whole of those details. In the narrative of facts I have endeavoured to ignore my personal interest in them as far as possible, and I have confined myself strictly to such as are, in my opinion, necessary to show what has been done, and can be done again, under our Grand Jury system, by persons thoroughly acquainted with their "*modus operandi*" and bad enough to pervert to wicked ends.

I will proceed to mention the indictments, to which I add a brief explanation.

Three of the indictments for misdemeanors were for embezzling the funds of the Company, in consequence of items which were placed to my credit, in 1861 and 1862, for one per cent. commission, in consideration of my personal endorsation of the notes of the Company. What will show the character of these indictments, in the clearest light, is the fact that the directors who succeeded me charged the Company and were paid, *one and a half* per cent. for endorsing its notes; and in some instances higher commissions for that service were

paid to them; but in no instance, after I left, was the commission as low as one per cent. *Every one* of the directors, who caused me to be indicted for these offences, were paid such commissions for endorsing, and which amounted, in the aggregate, from 1862 to 1864, (as I was informed by Mr. Murphy, corroborated by others) to upwards of twenty thousand dollars, or more than twenty times the total amount which was placed to my credit for that service, and for which they indicted me as having embezzled.

As to the other indictments for larceny and misdemeanors, it is sufficient here to draw attention to the fact that I was indicted four years after they were alleged to have been committed. That the Company had subsequently become a defaulter to me, and I had instituted legal proceedings against it for recovery of money. That I had succeeded in all those suits as far as they had gone; and at last unexpectedly obtained a decision which was more important, than all the other decisions put together, for my cause; and I will merely add that one of those indictments for larceny was for stealing the sum of *three dollars and fifty-eight cents.* This, from a business of which I was the founder, principal owner, and sole manager for nearly ten years, and whose transactions are counted by millions!

The indictment for perjury, on which a true bill was found, was based on a portion of one of my answers to questions which were put to me in my examination in the civil suits, and which was detached from its direct and necessary connection with preceding and subsequent questions and answers, with which, had the connection been preserved (as in law as well as in equity it should have been) no one could possibly have entertained the slightest objection.

The indictment for perjury, on which no bill was found, was based on allegations contained in the affidavit which was fyled with my petition to intervene in the suit Benning *vs.* The Canadian Rubber Company, noticed elsewhere.

I will also add that all these indictments, except those for perjury, were obtained from the Grand Jury through the sole evidence of one Rogers, a former book-keeper of the Company, who had absconded, in 1863, under circumstances which will be made known more fully in future proceedings before the proper tribunal, and who was paid a certain sum of money to return to Canada for this purpose.

Every one of the transactions on which the indictments were based were as well known to the directors at the date of the agreement of the 30th of June, 1862, as they are now, and also to my late co-directors and co-shareholders, Messrs. Bishop and Meyer, and no more thought was then entertained of giving a criminal complexion to them by any one, than of charging me with witchcraft. But as soon as an ulterior purpose was to be accomplished by doing so, the necessary experience, wickedness, and facilities were, at the command of the directors to accomplish their object, the principal object being to prevent me from getting access to the books of the Company, and thus prevent a public exposure of the transactions of Benning & Barsalou, and Peter S. Murphy, jointly and separately, which, to say the least, will not bear investigation. This, those persons were determined to prevent at all risks, even by utterly destroying me. They *dare not* allow me to have full and free access to those books. The desperate means which they have taken to prevent it justifies me in believing that even more desperate measures may be resorted to, if necessary, for that purpose.

It may be said, or thought, that some parts of this narrative are inconsistent with my professed object—that many details of a personal nature might and should have been omitted ; but it should be remembered that details are necessary to form a connected narrative, and where the dividing line is to be drawn is always difficult to decide, under such circumstances as those in which I am placed. Hereafter, when everything connected with this matter becomes fully known, many may wonder at my moderation now. In the narrative I have endeavoured to confine myself to showing, by a truthful and fair statment of facts, that every man is liable, particularly if he has been engaged in large and complicated commercial transactions, and no matter how innocent, to be treated as a felon, thief, or murderer, and published as such, without having had a chance to say a word in his defence, or even knowing that such a charge has been made against him, until he reads it in the public press, at the same time as hundreds of thousands read it ; and that, practically, *this is one stage of condemnation* which is directly contrary to the spirit of the English Criminal Law, and to all ideas of justice and fairness.

There is no subject of a temporal nature, of equal importance to

that of a pure administration of justice, and whenever there is a demonstration of the existence of an evil in that branch of our social organisation it should be treated as a surgeon treats a wound or a disease which threatens a vital part of the physical system. But it is so very difficult to awaken an interest in a question of this kind, of such force as to lead to practical results, that the attempt to do so would be almost presumptuous in one so incapable of doing justice to the subject as I am; but for my personal experience of the evil, which not only enables me to place the subject clearly before the public by a narrative of facts, but also renders it, in my opinion, a duty to do what my humble abilities permit, to procure the abolishment of so terribly an unjust a practice, and fortunately there is ready to my hand, to aid me, one of the most able and convincing, at the same time authoritative, disquisitions on this subject, which I gladly avail myself of.

This subject of secret indictments by Grand Juries does not now come before many for the first time; but judging from my own experience, I think that not one person in every thousand in Canada has the slightest idea of the magnitude of the danger which exists, or of the possibility of such outrages being committed under our Grand Jury proceedings. In the State of New York, the subject was brought before the legislature, and a commission was appointed to inquire into and report upon it. This was about sixteen or seventeen years ago, and I cannot possibly do better than to copy the report of that commission entire. That report was followed by the passage of an act which rendered it impossible thereafter for any one to indict in secret for crime.

The Commissioners say:

"In approaching the subject of the powers and duties of the Grand Jury, the Commissioners have felt much embarrassment, and have therefore devoted to it the patient and laborious consideration which it demanded. The value of this institution is at the present day variously regarded. By some it is deemed of the highest importance, as furnishing, by reason of its secrecy, a most valuable aid in the efficient detection and punishment of crime, while by others it has been regarded, by reason of that very secrecy, as subversive of the rights and destructive of the liberty

of the citizen. Upon which side the balance of the argument preponderates it is not for the Commissioners to say or even to suggest. One thing, however, is certain, that the preservation of its usefulness, like that of every other department in the administration of the laws, depends upon a clear and well understood definition of its powers. To leave these vague and unlimited is to make the institution itself an object of jealousy and alarm. It is retained and perpetuated by the Constitution, and it is not the design of the Commissioners to abridge any of its just attributes or to propose anything which can in the slightest degree impair its usefulness or efficiency. But they at the same time regard it as their duty to propose, in respect to it, such provisions as will carry into effect its objects according to the spirit of the institution itself, and in harmony alike with the interest of the public and of the citizen. It had its origin in England at a time when the conflicts between the power of the Government on the one hand, and the rights of the subject on the other, were fierce and unremitting, and it was wrung from the hands of the Crown as the only means by which the subject appealing to the judgment of his peers under the immunity of secrecy, and of irresponsibility for their acts, could be rendered secure against oppression. Happily, in our country, no illustration of its value in this respect has been furnished. But it was nevertheless introduced among us in the same spirit in which it took its rise in the mother country, and as the very language of the constitution shows, was designed to be a means of protection to the citizen against the dangers of a false accusation, or the still greater peril of a sacrifice to public clamour. That language is, that 'no person shall be held to answer for a capital or otherwise infamous crime, (except in cases which are enumerated) unless on presentment or indictment of a "Grand Jury.'

"Acting within this sphere, the institution of a Grand Jury may be justly regarded not merely as a safeguard to private right, but as an indispensable auxiliary to public justice, and within these limits it is the duty alike of the legislature and of the people to sustain it in the performance of its duties. But when it transcends them—when it can be used for the gratification of private malignity—or when, wrapping itself in the secrecy and immunity

with which the law invests it, its high prerogatives are prostituted to purposes frowned upon by every principle of law, and of human justice—it may become an instrument dangerous alike to public and to private liberty.

" That it has been so used is a fact which admits of no disguise. Cases are not unfrequent, where parties, stimulated by avarice or revenge, have found their way into the secrecy of a Grand Jury room, and upon a state of facts which would not warrant the commitment of the defendant in any other form, have succeeded in obtaining an indictment against him. It is well known, among the legal profession at least, that the just legislation, which has abolished the imprisonment of the debtor in a civil action, has led to an unexampled number of complaints against many whose greatest crime was their misfortune, upon the allegation of the fraudulent procurement of property; and the experience of every lawyer will attest the fact, that there are few cases in which the disappointed creditor would not, if he could, invoke the aid of the Criminal law, as the means not so much of punishment as of coercion. In cases of this kind, as well as in others rather of a private than of a public nature, it will be readily perceived, there is some danger that the Grand Jury may be used for purposes not only unnecessary, but absolutely hostile to the interests of the public. This is but one class of cases illustrating the danger of allowing the Grand Jury, under their general power to inquire into all offences triable within their county, to hear complaints in the first instance and to originate accusations. But a still more striking example of the danger of this unrestricted power is to be found in the fact that cases have existed where prosecutors who have been defeated before the examining magistrate, have availed themselves of the privilege of the subpœna of the district attorney, to present themselves before the Grand Jury, and, upon a one-sided statement, obtain an indictment. The powers and duties of the Grand Jury being in this respect wholly undefined, the practical result has been that private information conveyed to a Grand Juror, or the permission of the district attorney (who may literally be said to keep the keys of the Grand Jury room) has led to numberless prosecutions prompted by private interests, and to speculations upon the fears of the unfortunate, which would

have been defeated by a public scrutiny, or by an opportunity afforded to the accused of explaining or defending himself against the charge.

" If the grand jury is to be preserved in its purity—if the confidence of the people is to be enlisted in its behalf, without which its usefulness must cease—these things must be corrected by wholesome legislation. The grand jury was designed to be, and the commissioners are willing to admit in most cases is, a body of discreet and thinking men, called together to protect the public interests, and not to be converted into instruments of private cupidity or vengeance, instead of being an accusing party, it is and ought to be a judicial tribunal, instead of acting hastily and unadvisedly upon an accusation against the citizen, and placing him upon trial for the gratification of private feeling, it should be made to stand upon the higher ground of vindicating the dignity of the public law. To do this limits must be set to the extent of its powers, and restrictions must be placed upon their exercise. Without these—rendered necessary by the secrecy by which the grand jury is surrounded—the full assurance cannot exist, that public and private interests are safe in its hands.

" Under the present system these safeguards cannot be found. Within the sphere of what they choose to consider their duties, the grand jury is omnipotent. Accusations in which the public are deeply concerned may be dismissed without a question, indictments may be preferred upon slight evidence, or upon no evidence, and the action of the grand jury is beyond the reach of law, and in short, acting as it does, without responsibility, there is no slight reason to fear, that from being conservative in its aims, it may ultimately degenerate into an object of private aversion. From the abuses of which it is susceptible, and which have been too often practiced under its unconscious sanction, it is not to be disguised that even now its moral power is waning, and unless preserved by legislation, may eventually cease. These remarks are made in no unfriendly spirit to the existence of this institution, but from a firm conviction, that to preserve its usefulness, and indeed its very existence, the restraints, as well as the safeguards of the law, must be thrown around its action. To effect this object, the first principle which the commissioners assume is,

that the functions of the grand jury as an accuser and as a judge should be separated, it is not proposed to abridge their powers, in respect to the inquiry into the commission of crime. These seem to be an inherent element in their composition; but the proceedings which are taken upon them should be essentially different. When the accused is arrested and brought before a magistrate, an opportunity is afforded him of answering the charge, and of explaining the circumstances tending to establish his guilt. A responsible accuser is also presented, to whom he may look for redress, if the accusation be malicious or unfounded; but when he is accused by the grand jury, this protection is denied him, and he is dragged before the bar of justice, to answer a charge possibly as false in its substance as it may be malicious in the motive by which it is prompted. A course of practice which results in this injustice is not to be defended upon any principle sanctioned by the wisdom of the common law. Its theory is, that every man shall have a full opportunity to meet an accusation against him; and it is a violation of that theory, that he should be subjected to any stage of condemnation without the privilege of being heard in his own defence. The commissioners have accordingly proposed two modes of proceeding upon the action of the grand jury; first, that when the defendant has been held to answer the charge, and in no other case, the grand jury may, if they believe him guilty, find an indictment against him; second, that if, upon an investigation of a charge against him, whether originated by themselves or presented by another, they believe he is guilty of a public offence, they must proceed by presentment. The indictment is defined to be an accusation, presented by a grand jury to a competent court, charging the defendant with a public offence. The presentment is an informal statement by the grand jury, representing that a public offence has been committed which is triable within the county, and that there is reasonable ground for believing that the defendant has committed it. Upon the former, he is of course to be held for trial; but upon the latter, he is only to be held for examination before a magistrate, in the same manner as if information had been given to the magistrate in the first instance, and with the same opportunity for explanation or defence.

These provisions, though new in practice, are in principal no innovations. In the criminal code recently adopted in Virginia, a similar provision is contained. Laws of Virginia 1848, *page* 145, *sec.* 16. And it may be safely asserted, that the principle contained in them is in consonance with the common law itself. In a late case in Pennsylvania, the office of a grand jury was stated by judge King to be confined to the examination of such cases as were presented by the Attorney General, after previous binding over by a committing magistrate. This doctrine was held, in a case where a communication had been received from the grand jury, stating that charges had been made by one of their number, to the effect, that one or more members of a public trust had been guilty of converting public money to their own use, and asking that witnesses should be furnished them to enable them to examine the charge."

The remarks of the learned judge are so clear and forcible, that the commissioners cannot forbear giving them.

" The third and last of the extraordinary modes of criminal procedure," says he, " known to our penal code is that which is originated by the presentment of a grand jury." A presentment, properly speaking, is the notice given by a grand jury, of any offence, from their own knowledge or observation, without any bill of indictment being laid before them at the suit of the commonwealth. Like an indictment, however, it must be the act of the whole jury, not less than twelve concurring in it. It is, in fact, as much a criminal accusation as an indictment, except that it emanates from their own knowledge, and not from the public accuser, and except that it wants technical form. It is regarded as instructions for an indictment. That a grand jury may adopt such a course of procedure, without a previous preliminary hearing of the accused, is not to be questioned by the court. And it is equally true, that in making such a presentment, the grand jury are entirely irresponsible either to the public or to individuals aggrieved; the law giving them the most absolute and unqualified indemnity, for such an official act. Had the grand jury, on the present occasion, made a legal presentment of the parties named in their communication, the court would, without hesitation, have ordered bills of indictment against them, and would have furnished the grand jury with all the

testimony, oral and written, which the authority we are clothed with would have enabled us to obtain. While the power of presentment is conceded, we think no reflecting man would desire to see it extended a particle beyond the limit fixed to it by precedent and authority. It is a proceeding which denies the accused the benefit of a preliminary hearing; which prevents him from demanding the endorsement of the name of the prosecutor on the indictment before he pleads,—a right he possesses in every other case,—and which takes away all his remedies for malicious prosecution, no matter how unfounded the accusation, on final hearing, may prove to be, a system which certainly has in it nothing to recommend its extension. Grand juries are high public functionaries standing between the accuser and accused. They are the great security to the citizens against prosecution, either by Government, or political partizans, or by private enemies. In their independent action, the persecuted have found the most fearless protectors; and, in the record of their doings are to be discovered the noblest stand against the oppression of power, the virulence of malice, and the intemperance of prejudice. Those elevated functions do not comport with the position of receiving individual accusations from any source, not preferred before them by the responsible public authorities, and not resting in their own cognizance, sufficient to authorize presentment. Nor should Courts give unadvisedly, aid or countenance to any such innovations. For if we are bound to send for persons or papers, to sustain one charge, by a grand juror, before the body, against one citizen, we are bound to do so upon every charge which every other grand juror, present and future, following the precedent now sanctioned, may think proper hereafter to prefer. It is true, that in the existing state of our social organization, but partial and occasional evils might flow from grand jurors receiving, entertaining, and acting on criminal charges against citizens, not given therein by the public authorities, nor within their own cognizance. But we cannot rationally claim exemption from the agitations and excitements which have at some period of its history convulsed every nation. Those communities which have ranked among the wisest and the best, have become, on occasions, subject to temporary political and other phrenzies, too vehement to be resented by the ordinary safeguards provided by law for the security of the innocent. Under such irregular influ-

ences, the right of every member of a body like a grand jury, taken immediately from the excited mass, to charge what crime he pleases, on whom he pleases, in the secret conclave of the grand jury room, might produce the worst results. It is important, also, in the consideration of the question, to be borne in mind, that the body to be clothed with these extraordinary functions, is perhaps, the only one of our public agents, that is totally irresponsible for official acts. When the official existence of a grand jury terminates, they mingle again with the general mass of the citizens, intangible for any of their official acts, either by private action, public prosecution, or legislative impeachment. That the action of such a body should be kept within the power clearly pertaining to it is a proposition self-evident; particularly, where a doubtful authority is claimed, the exercise of which has a direct tendency to deprive a citizen of any of the guarantees of his personal rights, secured by the constitution. Our system of criminal administration is not subject to the reproach that there exists in it, an irresponsible body, with unlimited jurisdiction. On the contrary, the duties of a grand jury, in direct criminal accusations, are confined to the investigation of matters given them in charge by the court, of these preferred before them by the Attorney General, and of those which are sufficiently within their own knowledge and observation, to authorise an official presentment. And they cannot, on the application of any one, originate proceedings against citizens, which is a duty imposed by law on other public agents. This limitation of authority we regard as alike fortunate for the citizen and the grand jury. It protects the citizen from the prosecution and annoyance which private malice or personal animosity, introduced into the grand jury room, might subject him to. And it conserves the dignity of the grand jury, and the veneration with which they are always to be regarded by the people, by making them an umpire between the accuser and the accused, instead of assuming the office of the former.

" We have less difficulty in coming to these conclusions, from the consciousness that they have no tendency to give immunity to the parties named in the communication of the grand jury, if they have violated any public law. The charge preferred by the grand jury alluded to in the communication is clear and distinct. It is one

over which every committing magistrate of the city and county of Philadelphia has jurisdiction. Any one of this numerous body may issue his warrant of arrest against the accused, his subpœna for the persons and papers named, and may compel their appearance and production. And if sufficient probable cause is shewn that the accused have been guilty of the crimes charged against them, he may bail or commit them to answer to this court. The differences to the accused, between this procedure and that proposed are, that before a primary magistrate the defendents have a responsible accuser, to whom they may look if their personal and official characters have been wantonly and maliciously and falsely assailed. They have the opportunity of hearing the witness, face to face. They may be assisted by counsel, in cross-examining these witnesses, and sifting from them the whole truth. And not the least, they by this means know what crime is precisely charged against them; and when, where and how it is said to have been perpetrated: rights which we admit and feel the value of, and of which we would most reluctantly deprive them, even if we had the legal authority to do so.

"On the whole, we are of opinion, that we act most in accordance with the rights of the citizen, most in conformity with a wise and equal administration of the public law, by declining to give our aid to facilitate the extraordinary proceedings proposed against the parties named in the communication of the grand jury; and, by referring any one, who desires to prosecute them for the offences charged, to the ordinary tribunals of the Commonwealth, which possess all the jurisdiction necessary for that purpose, and can exercise it, more in unison with the rights of the accused, than could be accomplished by the mode proposed in the communication of the grand jury."—*Wartin's Criminal Law*, 117, 118.

"The spirit of the rule so well expressed in this extract, is embodied and carried out in the provisions proposed by the Commissioners, continuing in the grand jury all their powers in respect to the investigation of charges of crime. It is proposed to guard against hasty and ill-advised accusations, by giving to the defendant, upon presentment by the grand jury, (where he has not been already held to answer,) the same opportunity of answering or

explaining the charge as if he had been proceeded against by an information before a magistrate; while, on the other hand, he is to be committed or bailed upon the presentment, in precisely the same manner as upon an indictment. In this manner the rights of the defendant are protected, and the demands of public justice are abundantly answered.

"By other provisions, the duties of the grand jury, relative to the kind and degree of evidence upon which they may legitimately act, are defined. In practice, there is no established rule upon the subject; and grand jurors are left wholly uninformed, except as they are occasionally instructed upon it by the Court, as to the precise line of duty marked out for them by the law. The consequence has been, that acting very honestly under a mistaken view of their powers, indictments are frequently presented by them, upon evidence wholly inadmissible, and which, even if admissible, was legally inconclusive. In one case, an indictment for false pretences was found, upon a one-sided and extra judical affidavit taken in another state. In another, a witness was conducted into the grand jury room, with a long written narrative prepared by another, and was sworn by the grand jury, generally, as to the truth of the statement; and without further examination or a single question as to the particular facts constituting the accusation, the witness was dismissed and an indictment found. In both these instances, too, the cases originated before the grand jury; no previous complaint having been made. Nor was any remedy within the reach of the defendants. Indicted, as they were, upon palpably illegal evidence, there was no way of bringing the facts before the Court, so as to justify an application to quash the indictment. The Commissioners have reason to believe that innumerable cases of a similar and even of a more flagrant character have existed, and could, if necessary, be furnished. These, however, are deemed sufficient to illustrate the necessity of legislation, to guard against the continuation of the abuse—arising, too, from no dishonesty of motive, on the part of the grand jury, but from the fact that the delicate and difficult duties of the grand jury in this respect are entirely undefined by law.

"The remedy proposed by the Commissioners is to be found in the provisions which declare, that in the investigation of a charge

for the purpose of either presentment or indictment, the Grand Jury can receive no other evidence than such as is given by witnesses produced and sworn before them, or furnished by legal document, any evidence, or by the depositions of witnesses, taken under circumstances as to make them legally admissable ; and further, that they shall receive none but legal evidence, and the best evidence in degree, to the exclusion of hearsay, or secondary evidence. Sec. 259. 260. These are elementary and simple rules of evidence. They are the rules applicable to every judicial investigation, in accordance with which the examination before the magistrate must be conducted, and by the final examination of the case before the trial jury is governed. They are rules, too, of plain and familiar meaning, and can be easily applied ; or in case of doubt in respect to them, that doubt can be readily removed, by the resort of the Grand Jury to the advice of the Court, or any member of it, or of the District Attorney, who are in this as in every other stage of their proceedings, their legal advisers.

" Another question of consideration and practical difficulty has presented itself to the Commissioners. How far is the grand jury bound or authorized to hear evidence in exculpation of the defendant? Regarding it as a mere accusing body, the answer would be plain, that they are confined to the evidence offered in support of the accusation. But viewing them as a judicial tribunal, it might be said, with much propriety, that their powers and duties in this respect are more comprehensive. The Commissioners do not, however, adopt either extreme. The object of a public prosecution is to place the defendant on trial, when there is such reasonable evidence of his guilt as to afford a fair ground to charge him with the offence. His defence or explanation is then properly the subject of inquiry, and in such case should be submitted to the trial jury. It should, nevertheless, be made their duty, and the Commissioners propose to make it, to weigh all the evidence submitted to them, and when they have reason to believe that other evidence, within their reach, will explain away the charge, to order it to be produced ; and for that purpose, they should be authorised to require the District Attorney to issue process for the witnesses. Sec. 261. And as the concluding rule on this subject, the Grand Jury should be distinctly informed by the law, that they ought to find an indict-

ment, when all the evidence taken together, is such, as in their judgment would warrant a conviction by the trial jury. Sec. 262.

" In some of the views of the Commissioners, as well as in the conclusion at which they have arrived on the subject, they find themselves fully sustained by an article published in the London Law Magazine, No. 64, on the subject of defects of criminal procedure.

This article is extracted by the British Commissioners in their Eighth Report, pp. 357-369, as being expressly written in answer to the questions propounded in the form of a circular by the Commissioners.

" In addition to the commendation of the Commissioners upon it, it bears the signature of J. Pitt Taylor, Esq., a distinguished modern writer upon legal subjects.

" In this note, the Commissioners have extracted that part of the article only which relates to Grand Juries. It will be observed that its reasoning goes to the extent of abolishing the grand jury altogether. This, as the Commissioners have remarked, cannot in this State constitutionally be done. The reasoning referred to and the facts adduced in this article are not, however, the less valuable, as demonstrating the necessity of circumscribing and more clearly defining the powers and duties of the grand jury.

" According to the existing practice, prosecutions by indictment may commence, either by bringing against the defendant a public accusation before a magistrate, or a private accusation before the grand jury. Let us imagine that the first course is adopted. Complaint having been made to a magistrate, and the accused having been summoned or apprehended, the prosecutor and his witnesses are called upon in a public Court, and in the presence of the defendant, to state on oath the circumstances on which the charge is founded. The accused, or his legal adviser, has then an opportunity of cross-examining the witnesses, of calling others to contradict them, and of making any statement with the view of explaining, justifying, or disproving the charge. If the facts be intricate, if important witnesses be absent, or if time be required for a more careful scrutiny, the inquiry may be postponed to some future day ; till, at length, the case having been fully and openly heard on both sides, and the testimony having been reduced into writing, the magistrate decides whether or not the circumstances

are sufficiently suspicious to warrant their submission to a jury. If this decision be in the negative, the accused is discharged; if in the affirmative, he is committed or bailed.

"Such being the nature of the preliminary investigation before a magistrate, it would seem that, for the purposes of justice, no further inquiry would be requisite to the trial. But this is not the law; before the case can be presented for the consideration of the jury, the prosecutor and his witnesses, who may either be the parties previously examined, or different persons, must go, one by one, before a secret tribunal, composed of twenty-three gentlemen unacquainted with the law, and repeat the substances of their accusation, in the absence of the accused. No means are provided for testing the accuracy of their statements; the depositions taken before the committing magistrate, excepting at the Old Bailey, are not before them; neither, with a similar exception, is any person present, beyond the grand jurors themselves, to marshal the evidence, or in any way to conduct the proceedings. If, after this inquiry, twelve out of the twenty-three jurors consider that *prima facie* case of guilt is established, a true bill is found and the indictment is tried; if a like number entertain a contrary opinion, the bill is rejected, and the prosecutors must then either abandon the charge, or try his fortune before another grand jury on some future occasion.

"Now, if we contrast the different modes in which these two examinations are conducted, is it not obvious that, even supposing no collusive practices to exist, and assuming the committing magistrate to have no more legal experience than the members of the grand jury, his decision is more likely to be correct than theirs; that where they agree with him, they do not corroborate him—where they differ from him, they are probably wrong; thus, they can seldom do good, and may often do evil. But, if this be the case, when the committing magistrate is a mere justice of the peace, with how much greater force does the argument apply, where, as in London, Liverpool and Manchester, he is a professional man, well acquainted with the rules of evidence, and admirably fitted, from long experience, to unravel the tangled thread of human testimony.

"Besides it is idle to suppose that frauds are not daily practiced on the grand jury. At the preliminary inquiry before the magis-

trate, the defendant has an opportunity of ascertaining who are the witnesses who depose against him, and what is the nature of either evidence. If, then, he be admitted to bail, what is to prevent *him* —if he be committed to custody, what is to prevent his friends from tampering with the witnesses ? It would be useless, or at least highly dangerous to attempt to do so if they were only to be examined at the trial ; because, on that occasion, the evidence being given in a public Court would be publicly known, and the depositions being returned to that Court, any material variance in the testimony would be immediately detected, and would render the witnesses liable to an indictment for perjury. But the case is far different before the grand jury. There the jurors being sworn to secrecy, and each witness being examined alone, who is to discover any falsehood that one or more of them may be bribed to utter ? Yet, if any unexplained inconsistency appear in the narrative, the grand jury can scarcely fail to doubt its truth, and the consequence is that the bill is ignored. The prosecutor has no means of avoiding this result. He knows that some of his witnesses have betrayed him ; perhaps he has reason to suspect the individual who has done so ; but he has no remedy. An indictment for perjury must specify the words spoken, and how can he discover what these words were ? The law, indeed, may say that a false witness before a grand jury is subject to prosecution ; but the law does not add how a conviction can be obtained ; and we believe that, with one solitary exception, no trace can be discovered of such a proceeding.

" Again, if the witnesses are of such a character as to preclude the hope of their being successfully suborned, the accused may still escape, providing he can only bribe, (and this is no difficult matter,) some person to go to the prosecutor, and pretend that he is acquainted with facts corroborative of the charge. These facts being narrated with the semblance of zeal, the confidence of the prosecutor is gained; the defendant's friend, with the witnesses previously examined, is sent before the grand jury, and there, by an artful statement, throws such doubt on the matter, that no bill is found. It is true, that both these last mentioned abuses might be partially avoided, either by making the grand jury perform their functions as in former days they frequently did, in open court, or by directing that the attorney for the crown should in all cases

attend them with the depositions, and conduct the examination of the witnesses, and by distinctly empowering him, as also the grand jurors themselves, to repeat the evidence of any witness whom it might become necessary to indict for perjury. Still the inutility of the inquiry must remain as before; and when we find, as we presently shall do, that this useless machinery is productive alike of a large expense to the country, and of serious inconvenience to witnesses, are we not justified in advocating its immediate abolition?

"Next, let us suppose that the prosecutor, in the first instance, goes before the grand jury. In this case, the earliest intimation of the charge which the accused receives, is, that a bill is found against him. The particulars are kept secret; who his accusers are, or what they have testified against him, he has no means of discovering; indeed he cannot, except in some cases of high treason, so much as demand a copy of their names; nor in cases of felony, is he entitled, even to a copy of the indictment. The law, which now, in fairness, enables him, immediately after the investigation has closed before the magistrate, to obtain a copy of the depositions, at a small cost, and at the trial, to inspect these depositions, without any cost at all, refuses any such indulgence, in the case of a bill being found without a previous examination. That which the legislature admits to be just in the one case, it wholly disregards in the other; and thus, while a man, who has been publicly accused before a magistrate, has the amplest means of showing the character and motives of the witnesses, and of confuting the charge against him, a party, secretly attacked before the grand jury, is placed on his trial, under circumstances of cruel disadvantage, and must rely on chance, rather than the purity of his conduct, to establish his innocence. But this is not all. A prosecutor who prefers a bill before the grand jury, is not compelled to proceed to trial, in the event of its being found, neither are his witnesses bound over to appear and testify in court. A door is consequently opened to the most disgraceful practices. A bill found by perjury, becomes the instrument of extortion to the innocent but timid man; a bill found by true testimony is employed, with still greater power, to wring money from the guilty."

The unanswerable arguments in favour of the course recom

mended by the Commissioners, and which led to legislative action, in accordance with that recommendation, renders it quite unnecessary for me to add much on the subject; but, amongst several instances of unjust secret indictments which have come to my knowledge, there is one—the truth of which I will vouch for—which I cannot forbear mentioning. It was the case of a man, a Montreal merchant, who, through misfortunes, or, at any rate, embarrassment in his affairs, was tempted by a thorough and unmitigated villain, to the commission of criminal acts, or, rather, allowing such acts to be committed in his name, was then betrayed by his tempter to his creditors, and was procured to be indicted in secret before the Grand Jury. But ample opportunity and facility was afforded him to abscond, which he did, dying in a very short time of a broken heart, leaving his clever accomplice and betrayer the lion's share of the spoils, and, moreover, the enjoyment of the good opinion of the creditors and others, with the exception of a few who knew enough of the facts to enable them to form their own opinion, but who were also appalled by the wickedness, boldness, and complete success of the villain. Had the man been arrested, as he should have been, and his accusers examined by a justice of the peace, the whole of the facts must have been brought to light, and the really and most guilty person would have been exposed. In this case, tho mode of secret indictment caused a failure of justice in both ways, and it may safely be taken for granted, that, where indictments for criminal offences are presented to the Grand Jury, without first having gone through the preliminary proceedings before a committing magistrate, as the spirit of our criminal law contemplates in every instance, they are, in nine cases in every ten, originated and prosecuted for some ulterior purpose, not sanctioned by law or justice.

The instances are numerous in which unprincipled and unscrupulous lawyers have, either of their own motion, or yielding to suggestions of their clients, made use of the facilities afforded by the practice of secret indictments before Grand Juries, to extort money from unfortunate and timid persons, and they do this in most cases with perfect impunity. A masterly and well practised hand can be discerned all through the conduct of the prosecutors in my case, and it is fearful to contemplate the extent of the evil which such a profi-

cient in the art can accomplish in a community. But let this monstrous practice of indicting secretly be done away with, either by statute or practically, and their power for evil is at once destroyed.

That the ends of justice can be and are more completely fulfilled by the regular and proper mode of procedure before committing magistrates is, I think, unanimously conceded by the first lawyers in England and America, and by every man who carefully studies the subject. Therefore, as it is, I think, clearly shown that this objectionable feature in our Grand Jury system is not necessary for the ends of justice, and affords fearful facilities in the hands of unprincipled men to accomplish the most wicked and horrid ends, the question may well be asked, Why continue it any longer ?